FILED
JAN 3 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 455

WALTER L. IRVIN,
PETITIONER,

v.

L. F. CHAPMAN, Superintendent
of Raiford State Penitentiary,
Raiford, Florida,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS INVOLVED

We do not think that the question presented by the petitioner is the question to be decided by this Court. Rather, we submit that the controlling questions are as follows:

QUESTION ONE

WHERE THE PETITIONER, REPRESENTED BY ABLE COUNSEL OF HIS OWN CHOOSING, FAILED TO RAISE KNOWN AND EXISTING QUESTIONS OF ALLEGEDLY UNCONSTITUTIONAL PROCEEDINGS IN EITHER THE STATE TRIAL COURT OR

IN THE STATE APPELLATE COURT ON APPEAL, HAS HE WAIVED SUCH QUESTIONS SO AS TO BE BARRED FROM SUBSEQUENTLY RAISING THEM BY WAY OF HABEAS CORPUS?

QUESTION TWO

DID THE PETITION FOR HABEAS CORPUS WHICH THE PETITIONER FILED IN THE SUPREME COURT OF FLORIDA CONTAIN SUFFICIENT ALLEGATIONS AS TO THE STATE'S KNOWING USE OF FABRICATED EVIDENCE AND PERJURED TESTIMONY OR AS TO THE STATE'S CONSTRUCTIVE SUPPRESSION OF EVIDENCE, TO REQUIRE THE ISSUANCE OF A WRIT OF HABEAS CORPUS?

SUMMARY OF ARGUMENT

UNDER QUESTION ONE: The petitioner waived the right to present on habeas corpus the questions which he now seeks to present because said questions existed and were known to him to exist at the trial and subsequent appeal and, although represented by competent counsel, he failed to assert said questions at the trial or on appeal. The Supreme Court of Florida did not treat habeas corpus as permissible.

UNDER QUESTION TWO: The petition for habeas corpus was insufficient to require the issuance of a writ of habeas corpus because an analysis of its insubstantial allegations reveals no infringement of the petitioner's right to due process of law.

ARGUMENT

Question One

AS TO THE PETITIONER'S WAIVER OF HIS RIGHT TO ASSERT HIS CONSTITUTIONAL CLAIMS.

It was not necessary for the respondent to file any pleading in response to the petition for writ of habeas corpus because the Supreme Court of Florida took judicial notice of its records (75 So. 2d 591, text 592; appendix to petition for certiorari, page 15) and those records showed that the petitioner was not entitled to relief by way of habeas corpus.

Those records showed that the petitioner, represented throughout by able counsel of his own choosing, waived the questions presented by the petition for writ of habeas corpus by knowingly failing to present said questions to the trial court and by knowingly failing to present them to the Supreme Court of Florida on direct appeal.

The records[1] of the Supreme Court of Florida show that the rape was committed on July 16, 1949; that on August 12, 1949 the trial court appointed counsel to represent the petitioner; that on August 22, 1949 the petitioner obtained counsel of his own choosing and ever since that date he has been represented by able counsel of his own choice at every step of the way.

AS TO THE FOOTPRINTS AND FOOTPRINT CASTS, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

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[1] The transcript of testimony on direct appeal to the Supreme Court of Florida, a copy of which was filed in this Court in connection with petition for certiorari to review the affirmance in that case (No. 238, Misc., Oct. Term, 1953), will be referred to as "R". The record proper filed in the Supreme Court of Florida on direct appeal will be referred to as "Tr."

Although the petitioner had full opportunity at the trial and on appeal to the Supreme Court of Florida to raise the question of whether the prosecution knowingly used fabricated evidence and perjured testimony, he did not raise said question at any time prior to the filing of his petition for writ of habeas corpus.

The state's witness James L. Yates testified that he found footprints at the scene where the prosecutrix was abducted by the negroes; that he obtained from the petitioner's mother the shoes which the petitioner said he was wearing the night the rape was committed and took the shoes to the scene and compared them with the tracks and put the shoes in the tracks; that the shoes compared exactly with the tracks; that the tracks were plain in the ground, including the writing on the heel; and that so far as he could tell the petitioner's shoes were exactly the same pair that made the tracks; that he made plaster casts of the tracks; that these casts were all right when they were introduced in evidence at the first trial but had gotten all broken to pieces in going back and forth to the Supreme Court (R. 328-334); that the shoes were identical with the tracks which he found in the ground (R. 345); that he looked and saw that those were the same tracks that fitted the shoes; that he knew that those shoes made those tracks (R. 371).

The petitioner's objection to Yates' testimony as to the tracks and casts was upon the ground that Yates was not qualified as an expert (R. 331; 343-344). He never objected on the ground that Yates had fabricated evidence or was giving perjured testimony.

The petitioner made an issue as to the authenticity of the footprints from which the casts were made by putting on as his witness one H. V. Bennett, who said

that he was a professional consulting criminologist (R. 414); that he went to Tavares to the Clerk's office in the court house and found the plaster casts (R. 418); that the casts were broken all to pieces (R. 432); that he reassembled the broken pieces; that a photograph was made of the casts (R. 433); that there was no doubt in his mind that the footprints were made by the shoes in question (R. 435); that in the left shoe he found a convex impression rather than a concave impression in the imprint in the ground and that it was his conclusion that if a person were wearing a shoe and had his weight in that shoe he would have left a concave impression in the ground; that it was his impression that the impression was made with a shoe with a shoe tree in it (R. 436).

The state rebutted defense witness Bennett's testimony with the testimony of James L. Yates (R. 446-448) and with the testimony of LeRoy Campbell, who was with Yates when the investigation was made and when Yates went to the scene of the abduction and found the footprints there, and when Yates made the casts of the footprints (R. 448-450).

The petitioner raised no question in his motion for new trial as to perjured testimony or fabricated evidence (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any of the appeal briefs which he filed in the Supreme Court of Florida, or in his petition for rehearing. In short, he never raised the question in the trial court or in the Supreme Court of Florida on appeal.

It thus appears that the petitioner knew all of the facts with regard to these footprints and casts and, since there was no impediment in the way of his presenting the question of whether the state knowingly used fabricated evidence or perjured testimony at the trial and

on appeal, his failure to raise this question in due time bars him from raising it on habeas corpus.

AS TO THE SMEARS ON THE PETITIONER'S TROUSERS, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

The only objection that was made to the introduction of the petitioner's trousers in evidence was upon the ground that they were obtained by an illegal and unreasonable search and seizure. The state's witness Yates testified without objection as to the smears on said trousers. (R. 356-357). There was no objection to the introduction of the trousers in evidence, or to Yates' testimony as to the smears, upon the ground that the state had not obtained a scientific analysis of the smears.

No question was raised by the petitioner as to the state's failure to obtain a scientific analysis of said smears in his motion for a new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any of the appeal briefs filed by him in the Supreme Court of Florida, or in his petition for rehearing. No such question was ever raised by the petitioner in any manner in the trial court or in the appellate proceedings in the Supreme Court of Florida.

It thus appears that the petitioner had full knowledge of the facts regarding these smears and, since there was no impediment in the way of his raising at the trial and on the subsequent appeal the question of whether the state had violated his constitutional rights by failing to procure a scientific analysis of the smears, he waived the point by not presenting it in due time at the trial and on the appeal and he is barred from relief by way of habeas corpus.

AS TO THE COTTON OR LINT FOUND NEAR THE SCENE OF THE CRIME, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

The state's witness Yates testified that a handkerchief, to which a piece of cotton or lint was sticking, was found at the scene of the crime. The handkerchief, with the little piece of cotton tied up inside, was produced in court and identified. The handkerchief was introduced in evidence without objection. Yates testified without objection that the kind of cotton that he found on the handkerchief was all over the back seat and floorboards of the car identified by the prosecutrix as being the car in which she was raped; that evidently the upholstery had been torn up and was leaking out this cotton or lint; that the cotton and lint which appeared on the back seat of the car appeared to be the same material that he found clinging to the handkerchief. (R. 354-356).

The petitioner did not raise any question about the state having constructively suppressed evidence by refusing to obtain a scientific analysis of the lint in his motion for new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any appeal brief filed by him in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court. He never raised any such question at any time in the trial court or in the appeal proceedings in the Supreme Court of Florida.

Therefore, it appears that the petitioner knew all of the facts and, since there was no impediment in the way of his raising in the trial court and on the subsequent appeal the question of whether the state had violated his constitutional rights by not obtaining a scientific analysis of said cotton or lint, he waived the point by

not presenting it in due time at the trial and on the appeal and is barred from raising it on habeas corpus.

AS TO THE PLASTER CASTS OF THE TIRE TRACKS, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

The state's witness Yates testified that the casts which he made of the automobile tire tracks compared with the tracks on the tires themselves; that the imprints of which he made the casts compared exactly with the treads on the tires of the car; and that the tire tracks compared exactly with the treads on the tires on the automobile (R. 352-353). No objection was made to this testimony except upon the ground that Yates had not been qualified as an expert (R. 343-344). The casts were admitted into evidence without objection (R. 450).

The automobile belonged to James Sheppard (R. 382-386). It was brought to the court house before the first trial and was later turned back to James Sheppard (R. 352). Neither it nor the tires which were on it at the time of the commission of the crime were offered in evidence.

The petitioner raised no question as to constructive suppression of evidence because of the state's failure to obtain a scientific analysis with regard to these tire tracks and casts in his motion for new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any brief filed by him in the appeal proceedings in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court. He never raised any such question at any time in either the trial court or in the appellate proceedings in the Supreme Court of Florida.

It therefore appears that the petitioner had full knowledge of the facts concerning the tire tracks and casts, and, since there was no impediment in the way of his raising at the trial and on the subsequent appeal the question of whether the state had violated his constitutional rights by not obtaining a scientific analysis, he waived the point by not presenting it in due time at the trial and on appeal and is barred from raising it on habeas corpus.

AS TO THE STATE'S FAILURE TO PRODUCE THE TESTIMONY OF THE MEDICAL DOCTOR WHO EXAMINED THE PROSECUTRIX SHORTLY AFTER THE RAPE WAS COMMITTED, THE RECORDS OF THE SUPREME COURT OF FLORIDA SHOW THAT:

At no time during the trial did the petitioner raise any question about the state having suppressed evidence by failing to have the medical doctor testify who examined the prosecutrix shortly after the rape. He raised no such question in his motion for a new trial (Tr. 243-248), or in his grounds of appeal (Tr. 251-256; 259), or in any brief filed by him in the appellate proceedings in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court. He never at any time raised any such question in the trial court or in the appellate proceedings in the Supreme Court of Florida.

The petition for writ of habeas corpus made no claim that the petitioner and his counsel were unaware of this medical examination, and of the results thereof, in ample time to have raised the question in the trial court and in the Supreme Court of Florida on appeal. For all that the petition shows, the petitioner and his counsel knew that the medical doctor had examined the rape

victim and knew the results of the examination. The petition impliedly concedes that he had this knowledge because it says that "the state engaged in a constructive suppression of evidence by *refusing* to have the medical doctor testify . . ." (Appendix to petition for certiorari, page 9). This is not a mere allegation that the state *failed* to have the medical doctor testify. The word "refusing" must be assumed to have been knowingly used by the petitioner's able counsel and it should be given its usual and ordinary meaning.

This is not a case where a defendant was not represented by counsel when the petition for habeas corpus was drawn and therefore could be excused for not alleging that the matters regarding the medical doctor were unknown to him and his counsel at the time of the trial and subsequent appeal. Here we have a man who was represented by counsel whose abilities are recognized by this Court, and the utter failure of such counsel to make a showing in the petition for habeas corpus that these matters were unknown to counsel and to the petitioner at the time of the trial, in time to take advantage of the point at that trial and on the later appeal, can only be construed as an admission that the facts were known to the petitioner and his counsel all the way along. Because of the fact that the petitioner was represented by eminent counsel, this is peculiarly a case for the application of the rule of law that a pleading must be construed most strongly against the pleader, and it must be assumed that the petition for habeas corpus did not allege that he and his counsel were ignorant of the facts at the time of the trial and later appeal because he could not truthfully make such an allegation. To award a writ of habeas corpus to a defendant who is represented by astute legal counsel despite his failure to make out a prima facie case by alleging that he did not learn

of the matters alleged in his petition for habeas corpus in time to avail himself of them at his trial and on his subsequent appeal would be to make a shambles of orderly and fair court procedures and would permit such a defendant to trifle with the state court's judgments; it would permit such a defendant to delay and impede the execution of state court judgments by designedly omitting to allege matters essential to his ultimate success, for the purpose of obtaining a writ of habeas corpus which he knows he ought not to have. There is no excuse for the petitioner's failure to so allege, *if* he could truthfully have done so. He should not be permitted to trifle with the judgment of the courts of the State of Florida in any such fashion.

Therefore, since the petitioner at no time during the trial and subsequent appeal made any claim that the state had suppressed the evidence of the medical doctor by not calling him to testify, he waived the point and is barred from raising it on habeas corpus.

AS TO THE SHERIFF'S KILLING OF THE PETITIONER'S CODEFENDENT SAMUEL SHEPHERD:

The petitioner's affidavit which is attached to his petition for habeas corpus in the Supreme Court of Florida (pages 12-13 of the appendix to the petition for certiorari) shows that the sheriff killed Samuel Shepherd on November 6, 1951. It appears by the appeal record on file in the Supreme Court of Florida that the petitioner's trial was held in February, 1952. Yet, it appears by said record that at said trial the petitioner raised no question about said killing having resulted in the suppression of evidence which Shepherd might have given at the trial in behalf of the petitioner. Said record shows that he did not raise any such question in his motion for new trial (Tr. 243-248), or in his

grounds of appeal (Tr. 251-256; 259), or in any brief filed by him in the appellate proceedings in the Supreme Court of Florida, or in the petition for rehearing which he filed in said Court, or at any time in either the trial court or in the appellate proceedings in the Supreme Court of Florida.

It therefore appears that the petitioner had full knowledge of the facts concerning the killing of Samuel Shepherd and that at the trial and on appeal he could have raised in due time the question of whether his constitutional rights had been infringed and, there having been no impediment in his path, his failure to so present the point operated as a waiver thereof and he is now barred from raising it.

If, in the event of a denial of certiorari in this court, the petitioner would not be entitled to succeed in a later habeas corpus suit brought in a Federal court, then he is not entitled to a writ of certiorari in this cause, since the same constitutional objections to his conviction may be raised in a Federal habeas corpus suit that may be raised upon the pending application for certiorari. Therefore, what this Court has said in deposing of writs of certiorari to review the rulings of Federal courts in habeas corpus cases attacking the validity of state convictions upon constitutional grounds is pertinent, and we quote from Brown v. Allen, 344 U. S. 443, text 485-487, as follows:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 USC § 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal. To allow habeas corpus in such*

circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.

"Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials. Also, this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings. *Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.*

"North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. Preston v. Texas, 343 U S 917, 933, 96 L ed 1331, 72 S Ct 649; cf, Paonessa v. New York, No. 133 Misc, this Term, certiorari denied October 20, 1952 (344 U S 860, post, 667, 73 S Ct 99), because 'application therefor was not made within the time provided by law.' *We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with our conception of proper procedure.*

"Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to § 2254. See note 17, supra. See also note 2, supra. We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rul-

ings. *A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.* The judgment must be affirmed." (Italics supplied).

We also quote footnote 24 to Brown v. Allen (text 480) as follows:

"Evidence in state criminal proceedings to support objections on federal constitutional grounds, known to state defendants and their counsel, or easily ascertainable, cannot be withheld or neglected at the state trial and used later to support habeas corpus. State criminal proceedings would be unreasonably hampered. Ex parte Spencer, 228 U S 652, 660, 57 L ed 1010, 1013, 33 S Ct 709; Re Wood, 140 U S 278, 285, 35 L ed 505, 508, 11 S Ct 738; Crowe v. United States (CA4th NC) 175 F 2d 799; Price v. Johnston, 334 U S 266, 289, 92 L ed 1356, 1371, 68 S Ct 1049, and the dissent."

We submit that the foregoing quotations from Brown v. Allen sustain our position that the petitioner's failure to raise in due time the questions sought to be raised on habeas corpus bars him from relief by way of habeas corpus.

It may be that the petitioner will contend that the Supreme Court of Florida treated habeas corpus as permissable and that therefore he is entitled to a review at the hands of this Court even though the questions presented in his habeas corpus petition were not presented at the trial or on appeal to the Supreme Court of Florida. We submit that the Supreme Court of Florida did not treat habeas corpus as permissible.

In support of the denial of habeas corpus on the ground that the sheriff's killing of Samuel Shepherd had resulted in a constructive suppression of evidence, the Supreme Court of Florida said that ". . . the petitioner is forclosed from now raising the question as to what testimony Shepherd might have given at the second trial..." and cited State ex. rel. Johnson v. Mayo, 69 So. 2d 307 (See 75 So. 2d 591, text 592; appendix to petition for certiorari, pages 15-16). The gist of the holding in the Johnson case was that a petitioner for habeas corpus who had previously had full opportunity to raise constitutional questions affecting the validity of his conviction, forfeits or waives his right to raise such issue and cannot successfully urge it in habeas corpus proceedings. We quote as follows from the opinion of the Supreme Court of Florida in the Johnson case:

> "But aside from this aspect of the petition, there is still another reason why the writ of habeas corpus should not be granted. *It is elementary that a writ of habeas corpus cannot be used as a substitute for appeal,* motion to quash or a motion in arrest of judgment. State ex rel. Linick v. Coleman, 144 Fla. 458, 198 So. 100; Skipper v. Schumacher, 124 Fla. 384, 169 So. 58, certiorari denied 299 U.S. 507, 57 S. Ct. 39, 81 L.Ed. 376; Collingsworth v. Mayo, Fla., 37 So. 2d 696; Harlan v. McGourin, 218 U.S. 442, 31 S. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849. In the instant case *the petitioner was represented throughout the course of his trial by competent counsel* who presented a vigorous defense to the criminal charge lodged against him. *The same attorneys represented him on the appeal.* The judgment and sentence of the court below were affirmed by this Court on October 24, 1952, after extensive briefs had been filed and full oral arguments had on the issues. See Johnson v. State, Fla., 61 So. 2d 179.

* * * * *

"*At no time during any of the aforementioned proceedings did the petitioner raise or suggest the ground now asserted in his petition for writ of habeas corpus, although throughout the entire period he has been represented by competent counsel.* He had the opportunity to raise the issue by motion for new trial, section 920.02(1), Florida Statutes 1951, F.S.A., and at the time the trial judge inquired of him before adjudication of guilt and sentence whether he had anything to say why the sentence of the law should not be pronounced against him; section 921.13, Florida Statutes 1951, F.S.A., or to raise it in his petition for leave to apply to the trial court for a writ of error coram nobis. Lamb v. State, 91 Fla. 396, 107 So. 535; Hysler v. State, 315 U.S. 411, 316 U.S. 642, 62 S. Ct. 688, 86 L. Ed. 932.

"In the petition for the writ of habeas corpus the petitioner has not made any attempt to give a reason for his failure to raise in prior proceedings the grounds now asserted for the first time in his petition for habeas corpus. Therefore, it must be held, under the decisions, that *he has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof.* Baker v. State, 150 Fla. 446, 7 So. 2d 792; Jennings v. Illinois, 342 U.S. 104, 72 S. Ct. 123, 96 L.Ed. 119; Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541; Cochran v. State of Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453." (Italics supplied).

Having stated that the petitioner was foreclosed from raising the question, and having cited the Johnson case, which hinged on waiver, in support of its rejection of the claim that the petitioner was entitled to habeas corpus because of the sheriff's killing of Samuel Shepherd, it clearly appears that the Supreme Court of Florida held that habeas corpus was not permissible, the petitioner having waived the right to invoke habeas corpus because of his failure to present the question on direct appeal.

As to the claim that the state constructively suppressed evidence by refusing to produce the medical doctor as a witness, the Supreme Court of Florida specifically stated that the petitioner ". . . has waived or forfeited the right to raise the issue by his failure to make timely assertion thereof. State ex rel. Johnson v. Mayo, supra." (See 75 So. 2d 591, text 593; appendix to petition for certiorari, page 17). Therefore, it is apparent that the Supreme Court of Florida did not treat habeas corpus as permissible but, to the contrary, specifically held that it was not permissible because the petitioner had waived his right to raise the issue.

As to the other claims made by the petition, viz., that the state knowingly used footprint casts which were patently false and knowingly contrived by state officials, and that the state constructively suppressed evidence by refusing to obtain scientific analyses of the smears on the petitioner's trousers, the lint found near the scene of the crime, and the plaster casts of the tire tracks, the Supreme Court of Florida dealt with these matters as follows (75 So. 2d 591, text 592; appendix to petition for certiorari, pages 14-15):

> "From a study of the petition it appears that, with the exception of the matters hereinafter noted, the petitioner has alleged no facts in his petition that have not heretofore been set at rest by this Court on an appeal from the judgment and sentence entered in the original cause. See Irvin v. State, Fla., 66 So. 2d 288, certiorari denied 346 U.S. 927, 74 S. Ct. 316, 98 L. Ed.____, rehearing denied 347 U.S. 914, 74 S. Ct. 479, 98 L.Ed. ____. Therefore, such matter is not now open for adjudication."

Since these questions were never raised at any time in the trial court or in the Supreme Court of Florida on appeal, and since said Court did not deal with them

or decide them on appeal (See Irvin v. State, 66 So. 2d 288), the said Court's statements that ". . . the petitioner has alleged no facts in his petition that have not heretofore been set at rest by this Court on appeal from the judgment and sentence entered in the original cause. * * * Therefore, such matter is not now open for adjudication", recognized that the petitioner had waived the questions by not presenting them on direct appeal and was a holding that habeas corpus was not permissible.

The result is that the petitioner, represented by competent counsel, waived his claims by not presenting them in due course to the trial court and to the Supreme Court of Florida on appeal and is therefore not entitled to a review by this Court.

Question Two

AS TO THE FAILURE OF THE PETITION FOR HABEAS CORPUS TO MAKE OUT A CASE REQUIRING THE ISSUANCE OF A WRIT:

We submit that the petitioner's allegations as to the state's knowing use of fabricated evidence and perjured testimony and as to the state's constructive suppression of evidence were insufficient to show a violation of his constitutional right to due process and were therefore insufficient to require the issuance of a writ of habeas corpus.

In attempting to charge that the state knowingly used fabricated evidence and perjured testimony, the petition for writ of habeas corpus alleged (appendix to petition for certiorari, page 7):

"D. Petitioner was convicted by the use of evidence which was patently false and knowingly contrived by state officials.

> "The footprint casts made by Deputy Sheriff Yates are patently false because it is impossible that the original footprints, from which the casts were made, were made by a shoe with a foot in it. The sole of every shoe when worn on the foot makes a concave impression on the ground. The footprints which were the subject of the testimony at the trial were convex, and thus necessarily false and contrived (R. 436, 437). By knowingly using such evidence, the State deprived petitioner of a fair trial and thus denied him due process of law."

It is to be noted that the petitioner cited as the only authority for his claim pages 436 and 437 of the record, which pages evidence the testimony of defense witness Bennett at the trial to the effect that the sole of every shoe worn on the foot makes a concave impression on the ground but that in the cast of the left shoe he found a convex impression and that it was his impression that the impression was made with a shoe with a shoe tree in it.

By presenting this evidence to the jury, the petitioner made an issue as to whether the footprints of which the casts were made were genuine or whether they were contrived and as to whether Deputy Sheriff Yates, who discovered the footprints and made the casts, testified falsely. The state produced the testimony of Yates and of LeRoy Campbell to show that the footprints of which the casts were made were genuine and not fabricated. The jury resolved the issue against the petitioner and there was no valid reason why they were not entitled to do so.

Even if the jury's verdict had not settled the matter contrary to the petitioner's contention, the basis of the petitioner's claim is the allegation that the evidence was fabricated because, while the footprint of which the

casts were made was convex "The sole of *every* shoe when worn on the foot makes a concave impression on the ground", and this allegation is manifestly contrary to the facts of life and hence insubstantial. The courts know what everybody else knows, that is to say, that the kind of impression made by the sole of a shoe on the ground when worn on the foot depends upon numerous factors, among them the kind of soil in which the imprint is made, whether the person wearing the shoe is standing still or walking or running, the kind of shoe he is wearing, whether the shoe has a stiff sole or a limber sole, whether his foot is deformed and where his weight rests on the shoe sole at the time the imprint is made. It may well be that the soles of *some* shoes when worn on the foot make concave impressions, but not so as to *every* shoe worn on the foot. Therefore, since the basic allegation is patently contrary to the facts, the claim is too insubstantial to require the issuance of a writ of habeas corpus.

Furthermore, there was no allegation that the prosecuting attorney knew that this evidence was false and contrived.

The allegations that the state engaged in a constructive suppression of evidence by refusing to obtain scientific analyses of the raw physical evidence (smear on trousers, lint, plaster casts of tire tracks) when such scientific analysis was available to local law enforcement officials (appendix to petition for certiorari, pages 8-9,) is patently a non sequitur. It cannot logically be said that the state *suppresses* evidence which it does not have and which doesn't exist. The fact that the state did not obtain all of the evidence which it might have been possible to obtain is in no sense a suppression of evidence. The evidence which the state did produce was

legally admissible. What the petitioner would have this Court hold is that even though he was convicted on the basis of competent, legally admissible evidence sufficient to justify the conviction, his constitutional rights were infringed because the state did not go further and obtain and produce further evidence. He is not entitled to such a holding. And this is doubly so in view of the complete lack of showing that the petitioner made any effort to obtain scientific analyses under court order or otherwise. The fact that Mr. Perkins, of counsel for the petitioner, had a court order which allowed an examination of the evidence in the case (R. 419) and that under this order defense witness Bennett examined the footprint casts and shoes and testified about them in court, shows that there was no suppression of evidence on the part of the state.

As to the allegations that Sheriff McCall's deliberate killing of Samuel Shepherd resulted in the suppression of evidence which Samuel Shepherd could have given on behalf of the petitioner herein and which would have proved petitioner's innocence of the crime with which he was charged (appendix to petition for certiorari, pages 5 and 9), these allegations were manifestly insufficient to show that the state violated the petitioner's constitutional rights by suppressing available evidence which might have benefitted him. The killing of Samuel Shepherd occurred several months before the trial and the petition does not even suggest that Sheriff McCall killed Shepherd for the purpose of or with any intention of preventing Shepherd from testifying in the petitioner's behalf. Moreover, the allegation that Shepherd *could* have testified in the petitioner's behalf if he had been alive at the time of the trial falls far short of showing that he *would* have done so. Also, the allegation that Shepherd's testimony would have proved peti-

tioner's innocence is far fetched; if he had been alive he might, if he chose to do so, have testified in the petitioner's behalf but that would have been far short of proving the petitioner's innocence.

Furthermore, it cannot rightly be said that Shepherd's testimony was suppressed because, as the Supreme Court of Florida pointed out (Irvin v. Chapman, 75 So. 2d 591, text 592; appendix to petition for certiorari, page 15) Shepherd testified in full detail at the first trial as to his and the petitioner's activities and the petitioner had the unquestioned right to present Shepherd's said testimony at the second trial which resulted in the conviction now under attack.

As to the claim that the state engaged in a constructive suppression of evidence by refusing to have the medical doctor testify who had examined Norma Padgett shortly after the rape was supposed to have occurred and that "... the petitioner based upon information and belief, *believes* that the state suppressed the testimony of the medical doctor because the said medical doctor would have testified that Norma Padgett had not been raped", these allegations are wholly insufficient to show that the state suppressed any evidence which would have benefitted the petitioner. The mere allegation, *upon information and belief,* that the petitioner *believes* that the medical doctor would have testified that Norma Padgett had not been raped did not even begin to allege that in fact the medical doctor would have so testified or that he knew anything which would have benefitted the petitioner. The most that he alleged was that somebody had informed him that the state suppressed the testimony of the medical doctor because he would have testified that Norma Padgett had not been raped, and that the petitioner believed it. There is absolutely no showing upon

which it could even remotely be inferred that his informant had any knowledge whatsoever as to what the medical doctor would have testified, or that the informant had any information even reportedly having its origin in any statement made by the medical doctor or by the raped woman, or that the informant had the slightest justification, even upon the basis of hearsay several times removed, for saying that the medical doctor would have testified that Norma Padgett had not been raped. The petition does not show any basis for the belief and therefore does not exclude the idea that it is purely fanciful. Least of all does it show that the medical doctor himself, who presumably had been available to the petitioner's counsel at all times for an interview, had ever indicated to anybody that if he had been called as a witness at the trial he would have testified that Norma Padgett had not been raped. The petitioner could not have advanced a more insubstantial claim.

Therefore we submit that on the merits the petition for habeas corpus was wholly insufficient to show that the state knowingly used fabricated evidence or perjured testimony or that the state suppressed evidence beneficial to the petitioner and that therefore the petition was insufficient to require the issuance of a writ of habeas corpus.

CONCLUSION

In conclusion, we submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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